

ESTATE OF LINDA M. WHITETAIL (DRUNKARD) PENN

(Deceased Cheyenne Unallotted)

IBIA 74-38

Decided May 9, 1974

Petition to reopen.

Granted.

Indian Probate: Guardian Ad Litem: For Whom Appointed: Generally

Failure to appoint a guardian ad litem for minor in probate proceedings violates the provisions of 43 CFR 4.282.

Indian Probate: Reopening: Waiver of Time Limitation

A petition to reopen, filed more than three years after the original order, will be granted where it is shown

that a minor child of the deceased either through mistake, accident, or fraud was not represented at the hearing and as a result thereof was not included as an heir in the original order.

APPEARANCES: Allen C. Quetone, Superintendent, Concho Agency, for and in behalf of Annette Lois Penn, a minor.

OPINION BY ADMINISTRATIVE JUDGE WILSON

This matter comes before this Board on a petition to reopen, dated April 3, 1974, filed by the Superintendent, Concho Agency, Bureau of Indian Affairs, Concho, Oklahoma, for and in behalf of Annette Lois Penn, a minor.

The petitioner sets forth the following reasons in support of his petition to reopen:

1. That on January 18, 1965, an order determining heirs was entered in the above estate in which it was determined that the sole and only heirs of the decedent were the surviving spouse and six children.
2. That on November 28, 1973, at a hearing in connection with the probate of Pauline Howling Crane Whitetail, deceased Cheyenne allottee No. 2966, the mother of the decedent, evidence was adduced establishing that the above decedent had an additional child, Annette Lois Penn, born on April 26, 1960. A copy of her birth certificate is attached hereto marked "Exhibit 1" and made a part hereof. [Note: Birth certificate not attached.]

3. The said child was not adjudged to be an heir at law of the decedent in the order of January 18, 1965.

The record indicates that the child in question, who is still a minor, was not represented during the original proceedings and as a consequence thereof, she was omitted from the Order of January 18, 1965. In the absence of any explanation for the foregoing failure and omission it can reasonably be assumed that it resulted either through mistake, accident or even fraud.

Appointment of guardians ad litem for minors in trust probate proceedings is required by the regulations, 43 CFR 4.282, and failure to do so is cause to reopen. Estate of Aho (Florence Mammedaty), IA-T-8 (November 30, 1967) and Estate of Betty May Black Garcia, IA-P-3 (July 21, 1967).

Good and sufficient cause appearing, the petition to reopen should be granted and the matter remanded to the Administrative Law Judge for further proceedings and disposition.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Estate of Linda Whitetail (Drunkard) Penn, deceased Cheyenne unallotted, is HEREBY REOPENED and the matter is hereby

REMANDED to the Administrative Law Judge with authority to appoint a guardian ad litem for the minor child, and to conduct, after due notice to all parties in interest, whatever proceedings he deems necessary in the matter and for the issuance of an appropriate order consistent with the evidence adduced therein subject to the right of appeal by an aggrieved party.

Done at Arlington, Virginia.

Alexander H. Wilson
Administrative Judge

I concur:

David J. McKee
Chief Administrative Judge